

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MARLON LORENZO BROWN,
Petitioner,
v.
NETHANJAH BREITENBACH, *et al.*,
Respondents.

Case No. 3:23-cv-00148-RCJ-CLB

ORDER

In this habeas corpus action, brought *pro se* by Marlon Lorenzo Brown, on September 18, 2023, the respondents filed a motion to dismiss (ECF No. 23), along with several exhibits (ECF Nos. 24, 25, 26, 27, 28, 29, 30, 31, 32, 34). Respondents filed three of those exhibits—Exhibits 256, 258 and 261—under seal (ECF No. 34), and they filed a motion for leave of court to do so (ECF No. 33).

Respondents' Exhibits 256, 258 and 261 include a total of 3,983 pages of material. Those exhibits are three documents, and attachments to them, filed in Brown's state court proceedings: a motion to disqualify a judge, a supplemental memorandum of points and authorities in support of a post-conviction petition for writ of habeas corpus, and a motion to clarify a minute order reversing a judge's recusal. There is no indication that any of those documents, or any part of any of those documents, was filed under seal in state court. Nevertheless, Respondents request that all the material in Exhibits 256, 258 and 261 be sealed because Brown's presentence investigation report dated April 11, 2018, "is one exhibit attached to the pleadings that [make] up Exhibits 256, 258, and 261." ECF No. 33 at 1. Respondents state that the presentence investigation report contains confidential information, and they point out that under Nevada law the contents of presentence investigation reports are not to be made a part of any public record. *Ibid.* That, though, is the only ground articulated by Respondents for their motion

1 to seal all 3,983 pages of Exhibits 256, 258 and 261. Brown filed a response to
2 Respondents' motion, stating: "Petitioner does not oppose Respondents' motion;
3 however, Petitioner would like a copy of the documents to be filed under seal, served on
4 him, for his records as he does not have a copy of the documents." ECF No. 36 at 2.

5 While there is a strong presumption in favor of public access to judicial filings,
6 and while courts prefer that the public retain access them, see *Nixon v. Warner*
7 *Communications, Inc.*, 435 U.S. 589, 597 (1978), a court may seal its records if a party
8 demonstrates "compelling reasons" to do so. See *Kamakana v. City & Cty. of Honolulu*,
9 447 F.3d 1172, 1178–79 (9th Cir. 2006). "Compelling reasons" exist where the records
10 could be used for improper purposes. *Kamakana*, 447 F.3d at 1179 (citing *Nixon*, 435
11 U.S. at 598). Under Nevada law, presentence investigation reports are confidential, and
12 are not to be made part of a public record. See NRS 176.156(5).

13 Brown's presentence investigation report and references to it make up only a
14 small part of Exhibits 256, 258 and 261. Respondents' motion to seal all of Exhibits 256,
15 258 and 261 on account of the confidentiality of the presentence investigation report is
16 overbroad. There is no showing of any compelling reason to seal the material in those
17 exhibits other than the presentence investigation report and references to it.

18 Therefore, the Court will grant Respondents' motion in part and deny it in part.
19 The Court will grant leave for Exhibits 256, 258 and 261 to remain under seal. However,
20 Respondents will be required to file three additional exhibits, not under seal, with only
21 the presentence investigation report and references to it redacted from those exhibits.
22 Respondents will also be required to file a notice regarding those three new exhibits,
23 identifying the locations within them where the redactions appear.

24 Regarding Brown's request to be provided copies of the exhibits filed under seal,
25 Respondents filed a response, stating that they oppose his request because they are
26 concerned disclosure of the confidential information contained in the presentence
27 investigation report could violate Nevada Department of Corrections regulations that
28 prohibit offenders from having access to information which, if disclosed, might endanger

1 the well-being of the prisoner who is the subject of the documents, or others, or that
2 might endanger the security of the prison, and regulations that specifically prohibit
3 production of presentence investigation reports to prisoners (ECF No. 38).

4 Respondents' concerns are well taken. Here too, though, the only information in
5 Exhibits 256, 258 and 261 that Respondents express concern about is the presentence
6 investigation report and references to it. Therefore, the Court will require Respondents
7 to serve on Brown copies of only the redacted new exhibits to be filed pursuant to this
8 order.

9 Brown filed a response to the motion to dismiss on September 25, 2023 (ECF
10 Nos. 35, 37). Respondents filed a reply to Brown's response on October 23, 2023 (ECF
11 No. 39). On October 26, 2023, Brown filed a motion requesting leave to file a sur-reply
12 regarding the motion to dismiss and requesting that the Court strike Respondents' reply
13 in support of the motion to dismiss (ECF Nos. 40, 41). His proposed sur-reply is
14 attached to Brown's motions as Exhibit A. The parties have briefed Brown's motions
15 (ECF Nos. 42, 43).

16 Brown argues, in support of his motion to strike Respondents' reply in support of
17 their motion to dismiss, that the reply was not filed in a timely manner. Brown is
18 mistaken. Respondents filed the reply 29 days after Brown filed his opposition to the
19 motion to dismiss. See ECF Nos. 35, 37 (response to motion to dismiss, filed
20 September 25, 2023), and ECF No. 39 (reply in support of motion to dismiss, filed
21 October 23, 2023). The scheduling order (ECF No. 7) gave Respondents 30 days to file
22 the reply. Brown's motion to strike will be denied.


23 Cognizant that Brown is proceeding *pro se*, the Court will grant him leave to file
24 his sur-reply in opposition to the motion to dismiss. The sur-reply is on file, attached as
25 Exhibit A to ECF No. 40; Brown need not re-file the sur-reply. The Court will grant
26 Respondents an opportunity to respond to Brown's sur-reply if they wish to do so.

1 **IT IS THEREFORE ORDERED** that Respondents' Motion for Leave to File
2 Exhibits *in Camera* and Under Seal (ECF No. 33) is **GRANTED IN PART AND DENIED**
3 **IN PART**. Respondents' Exhibits 256, 258 and 261 will remain under seal. Respondents
4 will have 30 days from the date of this order to file three additional exhibits containing
5 the documents in Exhibits 256, 258 and 261, not under seal, with only the presentence
6 investigation report and references to it redacted from those exhibits. Respondents will
7 then have 10 days, following the filing of the three additional exhibits, to file a notice
8 regarding those exhibits, stating the pages of the exhibits (referring to the ECF
9 pagination of the exhibits) on which the redactions are located. Respondents will also
10 be required, within 10 days following the filing of the three additional exhibits, to serve
11 copies of those exhibits (with ECF pagination), and a copy of the notice to be filed
12 regarding them, on Petitioner.

13 **IT IS FURTHER ORDERED** that Petitioner's Motion for Leave to File a Sur-Reply
14 (ECF No. 40) is **GRANTED**. The Court will consider Petitioner's Sur-Reply (attached as
15 Exhibit A to ECF No. 40) in resolving the motion to dismiss. Respondents may file a
16 response to the sur-reply within 30 days after this order is filed.

17 **IT IS FURTHER ORDERED** that Petitioner's Motion to Strike (ECF No. 41) is
18 **DENIED**.

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20 DATED THIS 22nd day of November 22, 2023.

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24 ROBERT C. JONES
25 UNITED STATES DISTRICT JUDGE
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